

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE EARL ZEIGLER, JR.,

Defendant-Appellant.

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UNPUBLISHED

September 28, 2010

No. 292528

Saginaw Circuit Court

LC No. 08-031091-FH

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of domestic violence, MCL 750.81(2), and of assault with intent to do great bodily harm less than murder, MCL 750.84. He was acquitted of unlawful imprisonment, MCL 750.349b, and two counts of felonious assault, MCL 750.82. He was sentenced as a habitual offender, fourth offense, to concurrent sentences of 93 days in jail for domestic violence and 152 months' to 40 years' imprisonment for assault with intent to do great bodily harm less than murder, both sentences to run consecutive to a parole violation. Defendant now appeals. We affirm.

This case arises out of a severe beating defendant inflicted upon his girlfriend in the basement of the house in which they lived. The fact that they got into an altercation—as well as the very significant disparity in size and strength between the two of them—is not in dispute. It is also not disputed that the victim sustained broken ribs and extensive bruising. Defendant disputed whether he kicked her, whether he used a knife on her, whether there was any amount of mutuality in the altercation, and the extent to which she was free to leave. His acquittals seem to suggest that the jury believed his version of events to a great extent. Defendant nevertheless raises a number of issues.

First, defendant contends that his right to be present during his trial was violated when, after repeated outbursts during the testimony of the emergency room doctor who treated the victim, the trial court removed defendant to a video feed equipped cell for the duration of the doctor's testimony. Even if it was, which we do not find, defendant has shown no prejudice.

A criminal defendant has a constitutional and statutory right to be personally present at a felony trial unless the right is waived. US Const Am VI, XIV; Const 1963, Art 1, § 20; MCL 768.3; see *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970), and *People v Mallory*, 421 Mich 229, 245-246, 246 n 10; 365 NW2d 673 (1984). However, neither the

constitutional nor the statutory rights to be present are absolute. *People v Krueger*, 466 Mich 50, 54 n 9; 643 NW2d 223 (2002). A defendant may lose the right to be present if he disrupts the proceedings and disregards warnings to desist, *id.*, although “courts must indulge every reasonable presumption against the loss of the right,” and “it can be reclaimed as soon as defendant is willing to conduct himself in an appropriate manner,” *Mallory*, 421 Mich at 248 n 13. But reversal is not warranted for a violation of the right to be present unless the error was more likely than not outcome-determinative or there is a reasonable possibility of prejudice. *Krueger*, 466 Mich at 54; *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977).

In this case, defendant had been warned repeatedly to speak only through his lawyer. He engaged in a profanity-laced tirade, interrupting the doctor’s testimony. Defendant was given the chance to remain in the courtroom—restrained, but with the restraints invisible to the jury—and he appears to have persisted in making outbursts. We do not find the trial court’s actions improper, given defendant’s repeated insistence on interjecting his view that the doctor was, in effect, lying. Furthermore, any prejudice was harmless. Defendant’s objection to the doctor’s testimony was mostly that (1) the victim’s jaw had been broken prior to the altercation, not that it was not broken at all; and (2) there was no actual evidence that he used a knife on the victim. The doctor did not opine as to when the victim sustained a broken jaw, and the jury acquitted defendant of felonious assault with a knife. Thus, defendant had nothing to contribute that would have rendered his defense any additional help, so any prejudice was harmless.

Defendant next contends that the jury should have been given an instruction on the lesser cognate offense of aggravated assault, MCL 750.81. See *People v Brown*, 87 Mich App 612, 615; 274 NW2d 854 (1978) (the crimes of assault with intent to commit great bodily harm and aggravated assault are accurately described as cognate). This Court reviews de novo a trial court’s decision whether to give a lesser offense instruction. *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005). A criminal defendant is entitled to a jury instruction on a necessarily included lesser offense, *not* a lesser cognate offense, if a rational view of the evidence would support such an instruction. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003); *People v Cornell*, 466 Mich 335, 353-357, 646 N.W.2d 127 (2002). The trial court correctly interpreted *Mendoza* and *Cornell* and therefore properly refused to give the requested instruction.

Defendant next argues that he should have been granted a continuance to obtain further witnesses. Again, we disagree. All other things being equal, defendant has not shown any prejudice. At the commencement of trial, defendant complained that his mother, another relative, and a person named Danny had not been successfully subpoenaed, with only one failed attempt at service. He did not explain what sort of assistance they would be able to give him. Furthermore, trial testimony indicated that the only person even arguably present during the altercation was Danny, who defendant later insisted “didn’t even witness this.” Defendant on appeal asserts that Danny “would have been able to testify as to what actually happened during the incident,” but the trial testimony explicitly and unambiguously refutes this assertion. Defendant cannot satisfy the prejudice requirement. *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976).

Defendant next contends that offense variable (OV) 7 should not have been scored at 50 points. We disagree. The trial court should score OV 7 at 50 points if the “victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear

and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). The facts here show that defendant was large and strong, whereas he described the victim as perhaps “90 pounds soaking wet.” It was not in serious dispute that, notwithstanding this disparity, they had a “wrestling match” that resulted in three broken ribs and a considerable amount of documented bruising. There was evidence from which the trial court could properly determine that this was not a “fair fight,” that it went on for a considerable length of time, and it resulted in extensive injuries to the victim. Indeed, the victim’s testimony provided ample support for the trial court’s scoring of OV 7 at 50 points. See *People v Wilson*, 265 Mich App 386, 396-398; 695 N.W.2d 351 (2005). Notwithstanding the fact that the jury did not find beyond a reasonable doubt that defendant had a knife, the trial court’s scoring of OV 7 at 50 points was proper. See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (applying preponderance of the evidence test with respect to a court’s scoring of the sentencing variables).

Finally, defendant contends that OV 8 should not have been scored at 15 points. We disagree. A trial court should score OV 8 at 15 points if the “victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). Force is unnecessary. *People v Spanke*, 254 Mich App 642, 645-648; 658 NW2d 504 (2003). All that is necessary “is that the movement not be incidental to committing an underlying offense” *Id.* at 647. A “place of greater danger” may merely be a place where others are less likely to be able to see the crime in progress. See *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009). Here, the movement of the victim to the basement of the house was not incidental to the commission of the underlying offenses of assault or of domestic battery, and others were less likely to observe the crimes in progress there. Indeed, as discussed, defendant indicated that the other person who was actually present in the house did not witness the altercation. The trial court properly scored OV 8 at 15 points.

Affirmed.

/s/ William B. Murphy  
/s/ Joel P. Hoekstra  
/s/ Cynthia Diane Stephens